

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,
NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION, and
ADMINISTRATOR, NEW JERSEY SPILL
COMPENSATION FUND

Plaintiffs,

V.

FORD MOTOR CO. and
BOROUGH OF RINGWOOD,

Defendants.

Civil Action No. 2:19-cv-12157-
CCC-SCM

Plaintiffs' Motion to Enter Consent Decree

Exhibit 1

Responsiveness Summary

RESPONSIVENESS SUMMARY

On May 6, 2019, the United States of America lodged a Consent Decree with the United States District Court for the District of New Jersey in Civil Action No. 2:19-cv-12157 to resolve claims of the United States, the New Jersey Department of Environmental Protection (NJDEP), and the Administrator of the New Jersey Spill Compensation Fund against defendants Ford Motor Co. (Ford) and the Borough of Ringwood (the Borough) under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA), 42 U.S.C. §§ 9601 *et seq.*, and the New Jersey Spill Compensation and Control Act, N.J.S.A. § 58.10-23.11 to -23.24 (Spill Act).

Consistent with 28 C.F.R. § 50.7, on May 9, 2019, the Department of Justice published a notice of lodging of the proposed Decree in the Federal Register, and invited the public to submit comments on the settlement for a period of 60 days. *See* 84 Fed. Reg. 20,429 (May 9, 2019). NJDEP also published a notice of lodging of the proposed Decree in the New Jersey Register, similarly inviting the public to submit comments for a 60-day period. 51 N.J.R. 641(a). The United States published a subsequent notice in the Federal Register on July 9, extending the comment period through July 29, 2019. *See* 84 Fed. Reg. 32782 (July 9, 2019). On July 1, 2019, New Jersey also extended its public comment period through July 29, 2019 by posting notice on the NJDEP webpage. Declaration of Kevin Kratina at ¶ 3, attached as Exhibit 7. Additionally, NJDEP provided written notice of the extension of its comment period on July 2, 2019 via email to the Ringwood Mines Community Advisory Group. *Id.*

The United States received approximately¹ 960 comments, including 43 untimely² comments. Declaration of Karen Moss at ¶ 11, attached as Exhibit 5. New Jersey received approximately 367 timely comments and 70 untimely comments. Kratina Decl., Ex. 7 ¶ 4. The timely comments received by the United States included 89 identical “U.S. small postcards,” 205 identical “U.S. large postcards” and 545 identical “U.S. form comments.” Moss Decl., Ex. 5 ¶¶ 3–7. The U.S. small postcards are available at Bates # RWML0000001–7, 15–34, 59, 61, 63, 119, 130, 136–49. The U.S. large postcards are available at Bates # RWML0000057–58, 60, 64–110, 120–28, 131–34, 150–62, 1391–97, 1400–01. The U.S. form emails include Bates #

¹ For the purposes of this Motion to Enter, including the attached exhibits, the United States and New Jersey provide approximate numbers of comments received because: 1) some commenters sent the same comment addressed to both Plaintiffs, potentially resulting in “double-counting”; 2) some commenters sent the same or similar comments at different times within the comment periods; 3) some commenters sent comments to New Jersey that were addressed to the United States in the subject line of the email; and 4) some of the comments received were very similar to the postcards and U.S. form comments described above. *See* Moss Decl., Ex. 5 at ¶¶ 4–7, 10; Kratina Decl., Ex. 7 at ¶¶ 4–5; *see also e.g.*, Comments to Proposed Consent Decree, attached as Exhibit 2 at RWML0000163, 165, 1432.

² The untimely comments were consistent with the U.S. large postcards, U.S. form emails, and N.J. large postcards that were timely submitted. Moss Decl., Ex. 5 ¶¶ 3, 5, 8; Kratina Decl., Ex. 7 ¶ 4. Thus, the Governments effectively reviewed all comments because the late comments were consistent with the timely ones. The untimely comments are not included in Exhibit 2.

RWML0000112–116, 165–278, 285–310, 313–50, 353–62, 365–424, 429–87, 491–98, 501–24, 526–37, 542–63, 568–75, 578–81, 584, 588–91, 594–99, 602–05, 608–11, 614–37, 640–77, 690–715, 718–41, 744–55, 758–65, 770–82, 786–812, 815, 823–98, 901–19, 924, 928–31, 934–45, 948–91, 994–1023, 1027–36, 1038–41, 1044–73, 1076–93, 1096, 1100–09, 1112, 1118–37, 1142–59, 1162–81, 1184–87, 1190–1203, 1208, 1213–18, 1221–52, 1254–1309, 1318–31, 1335–48, 1350, 1354–60, 1363–66, 1369–74, 1378–89.

Similarly, the 367 timely comments received by NJDEP included 284 “large N.J. postcards,” and 8 “small N.J. postcards.” Kratina Decl., Ex. 7 ¶ 4. For each of these 292 postcard comments, the text of the comments are almost identical. *Id.* Copies of these postcards are available at Bates # RWML0001398.³ Additionally, between June 19, 2019 and July 17, 2019, NJDEP received 533 emailed comments related to the proposed Decree that were automatically quarantined by the New Jersey Office of Information Technology spam filters. *Id.* ¶ 7. NJDEP was able to retrieve quarantine records for these comments showing the email sender, subject line, time, and date that the email comment was sent, but was unable to retrieve the substance of the comments themselves because they were automatically deleted two weeks after receipt and quarantined in accordance with the maximum time limit that quarantined folders are supported by the State of New Jersey’s vendor. *Id.* All of these quarantined emails were sent through the email address info@sg.actionnetwork.org, and all had the same subject line, “[EXTERNAL] United States of America, New Jersey Department of Environmental Protection, and Administrator of the New Jersey Spill Compensation Fund v. Ford Motor Co. and the Borough of Ringwood, D.J. Ref. No. 90–11–3–830/1,” except one bearing the subject line “[EXTERNAL] Make Ford clean All up.” *Id.* Because NJDEP received comments from this email address after July 17, 2019 that contained nearly identical subject line and comments as the 504 U.S. form emails, the 533 quarantined emails likely contained similar comments. *Id.*

Copies of the timely comments are attached as Exhibit 2. Plaintiffs redacted potentially personal identifiable information of commenters to comply with the Privacy Act of 1974, 5 U.S.C. § 552a. This included the commenter’s address, personal phone number, and email address, except where the commenter only provided an email address and not his or her name.

FORMAT OF THE RESPONSIVENESS SUMMARY

The Plaintiffs organized the comments by topic (as depicted in the topic headings), consolidated the text of like-kind comments, and summarized them in bold italics, referencing the individual comments by Bates numbers. The Plaintiffs’ responses to the comments appear in regular font.

I. Comments Regarding Site Remedies

a. Comments Concerning Soil Remediation

³ New Jersey maintains all of the postcards received related to this proposed Decree, but only 2 copies are attached to this motion. All copies received by NJDEP were almost identical, but for the cover of the postcard and sender information. Kratina Decl., Ex. 7 ¶ 6.

The selected remedy to remediate contaminated soil at the Site is insufficient because it fails to address public health concerns. The selected remedy should be replaced with an alternative remedy that would fully excavate all soil contamination, and Ford Motor Co. should be required to pay for that remediation.

Applicable Comments:

Bates # (U.S. large and small postcards; U.S. form emails; N.J. postcards); RWML0000008 (Sierra Club); RWML0000010 (Sullivan); RWML0000011 (Sancic); RWML000163 (Berman); RWML0000351 (Bur); RWML0000363 (Snodgrass); RWML0000427 (Mekras); RWML0000489 (Adams); RWML0000499 (Shea); RWML0000525 (Stearns); RWML0000538 (Outes); RWML0000540 (Drechsler); RWML0000548 (Wagner); RWML0000566 (Canepa); RWML0000576 (Fjord); RWML0000582 (Goldhammer); RWML0000586 (Reik); RWML0000592 (Dolsky); RWML0000600 (Gellert); RWML0000606 (Finneran); RWML0000612 (Fallert); RWML0000638 (Fraczek); RWML0000678 (Natalia D.); RWML0000716 (Weiman); RWML0000742 (Griffeth); RWML0000756 (Ufford-Chase); RWML0000766 (Moore); RWML0000768 (Wei); RWML0000784 (Janey); RWML0000813 (Fassett); RWML0000899 (Wearin); RWML0000920 (Rossiter); RWML0000922 (Grismer); RWML0000932 (Ashtyani); RWML0000926 (Lioi); RWML0000946 (Sundaram); RWML0000992 (Thombs); RWML0001024 (Dunlap); RWML0001026 (Orrison); RWML0001037 (Steele); RWML0001042 (Barker); RWML0001074 (Davis); RWML0001098 (Monette); RWML0001094 (Milanes); RWML0001110 (Buckland); RWML0001114 (Bush); RWML0001116 (Horowitz); RWML0001138 (Lutz); RWML0001140 (Carmel); RWML0001160 (Wilder); RWML0001182 (Schwalb); RWML0001188 (Conroy); RWML0001204 (Carpita); RWML0001206 (Carey); RWML0001211 (Osterbrink); RWML0001219 (Waran); RWML0001253 (Mueller); RWML0001310 & 1460 (Tedesco); RWML0001332 (Milligan/Chiang); RWML0001333 & 1439 (CAG email); RWMN0001349 (Siermarco); RWML0001352 (Ohrvall); RWML0001362 (Chip G.); RWML0001367 (Starr); RWML0001375 (Riggiola); RWML0001377 (Hsu); RWML0001390 (Tenthoff); RWML0001402 (Andrade); RWML0001403 (Kortjohn); RWML0001405 (Andreano); RWML0001408 (Feil); RWML0001413 (Arkema); RWML0001414 (Prince); RWML0001415 (McNally); RWML0001416 (Prince); RWML0001417 (Belluardo); RWML0001418 (McCloskey); RWML0001419 (Naprstek); RWML0001421 (Piatek); RWML0001422 (Miller); RWML0001423 (Williamson); RWML0001424 (Heavner); RWML0001425 (Miller); RWML0001427 (Fisher); RWML0001428 (Yavorksy); RWML0001429 (Rossin); RWML0001438 (Milligan)

Response:

CERCLA Section 113(h) expressly bars challenges to the selected remedy until the completion of the remedial action. 42 U.S.C. § 9613(h)(4); *e.g.*, *Schalk v. Reilly*, 900 F.2d 1091, 1095–97 (7th Cir. 1990). Therefore, comments criticizing the selected remedy are beyond the scope of this proposed Decree, which will require Ford and the Borough to implement the selected remedy upon approval by the Court.

Nonetheless, the selected remedy as documented in the Operable Unit 2 Record of Decision (OU2 ROD) and Explanation of Significant Differences was chosen in accordance with the National Oil and Hazardous Substances Pollution Contingency Plan (National Contingency Plan), 40 C.F.R. § 300 et. seq., which implements CERCLA, 42 U.S.C. §9601, *et seq.* Declaration of Joseph Gowers at ¶ 22, attached as Exhibit 3. As described below, the OU2 remedy is protective of human health and the environment. *Id.* at ¶¶ 23, 28–29. The selected remedy, along with each alternative remedy, was evaluated against nine criteria, as required by 40 C.F.R. § 300.430(e)(9). A selected remedy must be protective of human health and the environment, a threshold criterion of the National Contingency Plan. The other threshold criterion is that the remedy must comply with applicable or relevant and appropriate federal and state environmental requirements. EPA then evaluates five primary balancing criteria, including: (1) the long-term effectiveness and permanence of the remedy; (2) reduction of toxicity, mobility, or volume through treatment; (3) short-term effectiveness; (4) implementability; and (5) cost. Finally, EPA also considers state acceptance of a proposed remedy and community acceptance as modifying criteria in selecting a remedy. 40 C.F.R. § 300.430(f)(1)(i). In total, EPA evaluated 10 potential remedies for the Peters Mine Pit, 7 potential remedies for the Cannon Mine Pit, and 7 potential remedies for the O'Connor Disposal Area. Gowers Decl., Ex. 3 ¶ 22.

Additionally, in accordance with the National Contingency Plan, EPA conducted a remedial investigation of Operable Unit 2 of the Site (OU2) to collect sufficient data to characterize OU2 and the Site to develop and evaluate effective remedial cleanup alternatives. 40 C.F.R. § 300.430(d). As part of the Remedial Investigation, EPA performed baseline risk assessments to evaluate the contamination's current and potential future impacts on human health and the environment, which included a human health risk assessment. Gowers Decl., Ex. 3 ¶ 16. The human health risk assessment specifically assessed risk to public health under various scenarios in the absence of any remediation or control of OU2 contamination. *Id.*

In selecting the remedy for OU2, EPA determined that containment remedies for OU2 would be protective of human health and the environment, once implemented, by eliminating exposure pathways to the hazardous substances/waste material by containing the contaminated fill under an engineering cap. *Id.* at ¶ 28. Any drums or paint sludge that are found during the implementation of the OU2 remedy will be removed. *See id.* at ¶ 26. Furthermore, the engineered caps will reduce infiltration of precipitation through the fill materials and the potential for migration of contaminants from the fill into the groundwater and surface water. *Id.* at ¶ 28. As explained further below, groundwater at the Site will be subject to ongoing monitoring during the implementation of the OU2 remedy, until a separate remedy to address groundwater contamination is selected in a forthcoming ROD for Operable Unit 3. *Id.* at ¶¶ 19–21. In addition, because the selected remedy for OU2 will result in hazardous substances, pollutants, or contaminants remaining on-site above levels that allow for unlimited use and unrestricted exposure, a statutory review will be conducted no less than every five years, as required by CERCLA § 121(c), to ensure that the OU2 remedy remains protective of human health and the environment. *Id.* at ¶ 29. Thus, the selected remedy for OU2 as set forth in the OU2 ROD and Explanation of Significant Differences is protective and addresses public health concerns.

Further, under the proposed Decree, Ford and the Borough are responsible for implementation of the OU2 remedy, which necessarily includes payment for remediation of OU2. Consent Decree, Doc. 2-1, ¶ 6.a (requiring Ford to finance the Work).

This Site was previously listed on the National Priorities List and subsequently delisted when EPA believed the soil had been remediated. The community does not trust that remedies that fail to fully excavate all contamination will succeed.

Applicable Comments:

RWML0000010 (Sullivan); RWML0000818 (Spiegel); RWML0000768 (Wei); RWML0000818 (July Sierra Club letter); RWML0001026 (Orrison); RWML0001037 (Steele); RWML0001313 (Conway); RWML0001332 (Milligan/Chiang); RWML0001362 (Chip G); RWML0001377 (Hsu); RWML0001390 (Tenthoff); RWML0001403 (Kortjohn); RWML0001405 (Andreano); RWML0001408 (Feil); RWML0001409 (Pierro); RWML0001411 (Greenfield); RWML0001412 (Fuhr); RWML0001438 (Milligan); RWML0002618 (Mueller)

Response:

EPA recognizes that the protection of human health and the environment at a Superfund site can be achieved through a variety of methods in addition to excavation of the contamination, including: treatment to destroy or reduce hazards presented by a substance; engineering controls such as containment; and institutional controls, such as deed restrictions on the use of land, to prevent exposure to hazardous substances. As explained above, the OU2 ROD included EPA's detailed analysis of the remedial alternatives, including both capping remedies and excavation remedies, assessed against the required nine criteria set forth in the National Contingency Plan. And as explained above, the remedial caps will eliminate exposure pathways to hazardous substances and reduce precipitation infiltration and migration from contaminants into groundwater and surface water. EPA therefore determined that the containment remedies selected for OU2 would be protective of human health and the environment, as well as would satisfy the other eight criteria required by the National Contingency Plan. Gowers Decl., Ex. 3 ¶¶ 23, 27–28. Moreover, the OU2 remedy requires EPA to conduct a statutory review every five years to ensure that the remedy remains protective of human health and the environment, as required by CERCLA Section 121(c). *Id.* at ¶ 29; 42 U.S.C. § 9621(c). Therefore, EPA will monitor the OU2 remedy and be able to respond to potential problems that may arise with this remedy.

An assessment of long-term impacts of capping must be performed, and alternative remedies should be considered.

Applicable comment:

RWML000566 (Canepa)

Response:

As noted above, CERCLA Section 113(h) bars challenges to the selected remedy until the completion of the remedial action. 42 U.S.C. § 9613(h)(4). Nonetheless, the OU2 ROD extensively considered several alternative remedies for each portion of OU2. Gowers Decl., Ex. 3 at ¶¶ 16–17, 22. In comparing the different alternatives, EPA considered the long-term effectiveness and permanence of a given alternative as a primary balancing criterion. *Id.* The selected remedies for each portion of OU2 require long-term monitoring and maintenance of the caps to ensure their integrity and maintain their protectiveness. *Id.* at 19, 21.

The selected remedy to remediate contaminated soil at the Site is insufficient because it fails to account for historical subsidence at the Site. Old faults and fissures in the bedrock near Peters Mine are probably connected to the foundation rocks below Wanaque Reservoir. The selected remedy will not prevent contamination of the Reservoir.

Applicable Comments:

Bates # RWML0001313 (Conway); RWML0001116 (Horowitz)

Response:

EPA recognized that subsidence of the cap to be constructed in the Peters Mine Pit of OU2 may need to be addressed after construction and plans to address subsidence through construction methods and post-construction maintenance. Specifically, as noted in the OU2 ROD and the OU2 Final Remedial Design Report, construction of the OU2 remedy at the Peters Mine Pit will include compaction of fill materials in order to mitigate the potential for subsidence of the cap. Gowers Decl., Ex. 3 ¶ 32. Additionally, the Statement of Work of the Decree (SOW), which details the specific actions and deadlines required to implement the remedy, requires that Ford and the Borough prepare an Operations and Maintenance Plan that will describe the requirements for inspecting, operating, and maintaining the selected remedy. Statement of Work, Exhibit C of Consent Decree, Doc. 2-1 (hereinafter SOW), § 5.7(g), ECF PageID 171–78. As part of the Operations and Maintenance Plan, Ford and the Borough will be required to address subsidence issues that may compromise the protectiveness of the cap. Gowers Decl., Ex. 3 ¶ 32.

To the extent that Mr. Horowitz's comment (RWML0001116) expresses concern about the groundwater, as explained below, in Part II.b, EPA has not yet selected a remedy for the groundwater at the Site.

The selected remedy to remediate contaminated soil at the Site is insufficient because it relies upon atypical risk models, including the assumption that individuals heavily use the O'Connor Disposal Area of the Site for hunting.

Applicable Comment:

Bates # RWML0001313 (Conway)

Response:

Consistent with EPA risk assessment policy, during the planning phase for the baseline Human Health Risk Assessment, EPA sought information on how individuals may be exposed to site-related contaminants in order to develop realistic exposure assumptions and scenarios. EPA consulted residents of the Site to determine how they utilized the Site and how they may be exposed to contaminants. Gowers Decl., Ex. 3 ¶ 16. The baseline Human Health Risk Assessment evaluates current and potential future human health risks to determine whether sufficient risk exists to warrant a cleanup. *Id.* These are the typical risks that EPA evaluates for all sites. *Id.*

After 1974, areas of the Site that were used for waste disposal began reverting to a woodland capable of supporting flora and fauna. *Id.* at ¶ 10. In 1973, NJDEP had added the 109 acres of the Site donated by Ford to Ringwood State Park. *Id.* Moreover, the OU2 ROD documented that Ringwood residents regularly hunt game and gather wild plants at the Site for consumption, among other potential uses of the Site. *Id.* at ¶ 16. Thus, including exposure based on risks that hunters may encounter appropriately accounts for risks incurred by potential users of the Site, even if not all users consume game or wild plants from the Site.

The soil remedy for the Peters Mine Pit must ensure that tree roots do not undermine the caps.

Applicable Comment:

Bates # RWML0001313 (Conway)

Response:

EPA, Ford, and the Borough considered tree roots during the design of the cap for the Peters Mine Pit. Gowers Decl., Ex. 3 ¶ 33. The current design of this cap calls for greater than 10 feet of fill to be installed on top of the geotextile fabric over most of the capped area. *Id.* The vast majority of the tree roots are expected to be contained within the filled zone above the geotextile fabric. *Id.* Therefore, significant uptake of site-related contamination by vegetation planned on the cap in the Peters Mine Pit is not anticipated. *Id.* In fact, the permeable cap at the Peters Mine Pit allows for the establishment of trees with deep roots. *Id.*

The selected remedy has unexplained cost variations throughout the Site.

Applicable Comment:

Bates # RWML0001313 (Conway)

Response:

The selected remedy in the OU2 ROD provided for variations in the cost estimate for the two alternatives for the O'Connor Disposal Area. Gowers Decl., Ex. 3 ¶¶ 24–26. The OU2 ROD selected an excavation remedy for the O'Connor Disposal Area (denoted as Alternative 5A) and provided for a contingency remedy of capping (denoted as Alternative 4A) if certain conditions were met by the Borough. *Id.* at ¶ 21. Upon satisfaction of these conditions, EPA documented

selection of the capping remedy for the O'Connor Disposal Area in the Explanation of Significant Differences. *Id.* at ¶ 22. The differences in cost for certain similar items between the two remedy alternatives reflect the differences between the two remedies. *Id.* at ¶ 24. Both remedies include the same cost estimate for deer exclusion fencing and seed mix for restoration of wetlands required by NJDEP, but the capping remedy (Alternative 4A) includes additional costs for deer exclusion fencing and seed mix for the construction of new wetlands needed for that remedy. *Id.* The price difference in the seed mix accounts for conditions that are specific to the wetlands mitigation as part of the construction of new wetlands. *Id.* Similarly, cost variations between the two alternatives for "Site Cleaning, Grubbing, Mulching, Stump Disposal (Includes cap area and scraped area)" reflect differences in site cleaning and grubbing between Alternatives 4A and 5A. *Id.*

The selected remedy employs insufficient air monitoring [for the O'Connor Disposal Area].

Applicable Comment:

Bates # RWML0001313 (Conway)

Response:

The selected remedy for the O'Connor Disposal Area, the capping remedy denoted as Alternative 4A, does not employ insufficient air monitoring. Air monitoring employed during the selected remedy, Alternative 4A, will ensure that any impacts on workers and the surrounding community are addressed. Alternative 5A provided for more extensive excavation of impacted materials over a longer timeframe than Alternative 4A. Gowers Decl., Ex. 3 ¶ 25. Therefore, estimated air monitoring costs for Alternative 5A are greater than the estimated air monitoring costs for Alternative 4A. *Id.* However, it is anticipated that the capping remedy, Alternative 4A, as selected in the Explanation of Significant Differences, will involve the handling of more dry fill materials during cap construction than would be anticipated during implementation of Alternative 5A. *Id.* Therefore, dust control costs were estimated to be greater for Alternative 4A than Alternative 5A. *Id.*

The selected remedy fails to explain how contractors will determine what material must be removed offsite and what may be reused as fill in Peters Mine. It also fails to account for potential costs for removal of drums of hazardous material that may yet be found.

Applicable Comment:

Bates # RWML0001313 (Conway)

Response:

As detailed in the OU2 Remedial Design Report, excavated material will be staged in approximately 500 cubic yard stockpiles for sampling and analysis for the characteristics of hazardous waste—corrosivity, ignitability, reactivity, and toxicity. Gowers Decl., Ex. 3 ¶ 34. This testing will be done using the Toxicity Characteristic Leaching Procedure, in accordance with 40 C.F.R. Part 261, Subpart C. Samples will be collected from the stockpiles and sent to a

certified laboratory under proper chain of custody and with a rapid turnaround time. Gowers Decl., Ex. 3 ¶ 34. Material that is determined to be characteristically hazardous will be disposed of at an appropriate off-site facility. *Id.* Non-hazardous material will be used as fill in the Peters Mine Pit. *Id.* Furthermore, if paint or drums are encountered during the excavation process, they will be placed on and covered with plastic sheeting pending a Toxicity Characteristic Leaching Procedure analysis for off-site disposal at a permitted facility. *Id.*

Cost estimates for the selected remedy include costs to account for any uncertainties that may arise while implementing the OU2 remedy, including the potential for additional drums to be found. *Id.* at ¶ 26. The selected remedy for the Cannon Mine Pit calls for pull back of shallow soils surrounding the Cannon Mine Pit and into the pit itself. *Id.* However, cost estimates included in the OU2 ROD assume the need for excavation and off-site disposal of drums from the Cannon Mine Pit due to the discovery of drums in this area during the remedial investigation. *Id.* Similarly, the cost estimate for the Peters Mine Pit assumes that excavated material will be disposed of as non-hazardous waste based upon historic sampling results in this area. *Id.* However, as noted above, the cost estimate provides for the possibility of finding drums in the Peters Mine Pit. *Id.* In any event, the cleanup requirements of the OU2 ROD and Explanation of Significant Differences will be performed, regardless of the ultimate cost. *Id.*

The selected remedy breaches the core principles of the National Environmental Protection Act, civil rights laws, the U.S. Constitution, and human rights treaties.

Applicable Comment:

Bates # RWML0000576 (Fjord)

Response:

Courts have upheld CERCLA's limitation on remedy challenges in the face of various constitutional challenges. *Clinton Cty. Comm'rs v. U.S. EPA*, 116 F.3d 1018, 1026 (3rd Cir. 1997) (holding that Section 113(h) of CERCLA does not violate a constitutional right of access to court); *see also Alabama v. U.S. EPA*, 871 F.2d 1548, 1555–56 (11th Cir. 1989) (rejecting claim that a state's exclusion from ROD process violated the Fifth Amendment's due process protections for lack of standing). The Third Circuit explained that this limitation prioritizes clean up over delays that are inherent to judicial challenges; Congress instead chose to focus public participation on the notice-and-comment procedures that occur during the selection of the remedy, rather than during the implementation of a selected remedy. *Clinton Cty.*, 116 F.3d at 1025. Therefore, Section 113(h) precludes challenges to a selected remedy brought under the National Environmental Protection Act, the Administrative Procedure Act, or other federal statutes. *E.g., McClellan Ecological Seepage Situation v. Perry*, 47 F.3d 325, 328 (9th Cir. 1995) (“[T]he unqualified language of [Section 113(h)] precludes ‘any challenges’ to CERCLA Section 104 clean-ups, not just those brought under other provisions of CERCLA.”); *see also Broward Garden Tenants Ass’n v. U.S. EPA*, 157 F. Supp. 2d 1329 (S.D. Fla. 2001) (concluding that Section 113(h) bars remedy challenges brought under various constitutional and civil rights laws), *aff’d*, 311 F.3d 1066 (11th Cir. 2002).

b. Comments Concerning Groundwater

The selected remedy and consent decree fail to address contaminated groundwater at the Site. The Consent Decree should not proceed until a groundwater remedy for the Site has been selected.

Applicable Comments:

Form emails; RWML0000008 (Sierra Club); RWML0000111 (Sancic); RWML0000538 (Outes); RWML0000932 (Ashtyani); RWML0001313 (Conway); RWML0001362 (Chip G.); RWML0001390 (Tenthoff); RWML0001403 (Kortjohn); RWML0001405 (Andreano); RWML0001409 (Pierro); RWML0001410 (Manno); RWML0001422 (Miller); RWML0001423 (Williamson); RWML0001424 (Heavner); RWML0001425 (Miller); RWML0001428 (Yavorksy)

Response:

Consistent with the National Contingency Plan, EPA often segregates clean-up activities at a site into discrete actions, designated as “operable units” to address geographical portions of a site, specific site problems, or initial phases of an action to manage migration of contamination or eliminate or mitigate a release or threat of release of contamination or a pathway of exposure. *See* 40 C.F.R. § 300.5. Phasing the cleanup allows EPA to address environmental media or areas that have been characterized while the nature and extent of contamination in other areas of or media at the Site can be investigated. This allows for a more expeditious cleanup of the overall site. *See, e.g., United States v. Manzo*, 182 F. Supp. 2d 385, 402–03 (D.N.J. 2000) (explaining the benefits of dividing a site into different operable units).

The selected remedy addresses waste in the Cannon Mine Pit, the Peters Mine Pit and the O’Connor Disposal Area, which are sources contributing to the groundwater contamination at the Site, and it represents the second of three phases of cleanup at the Site. Gowers Decl., Ex. 3 ¶ 8. The groundwater contamination at the Site is being investigated as part of Operable Unit 3, and a remedy will be selected for Operable Unit 3 in a future Record of Decision. *Id.* However, the selected remedy for OU2, once implemented, will limit direct exposure to contaminated soil and fill material and mitigate their potential as a source impacting the groundwater by reducing migration of precipitation through contaminated fill material into the groundwater and surface water. *Id.* at ¶ 27. The selected remedy also includes groundwater monitoring at the Cannon Mine Pit, Peters Mine Pit, and O’Connor Disposal Area until the Operable Unit 3 remedy is selected. SOW, § 1.3 at pp. 2–4, PageID 158–60. Therefore, EPA anticipates that implementation of the selected remedy will be consistent with the future groundwater remedy at the Site. *See* Gowers Decl., Ex. 3 at ¶ 8.

The North Jersey District Water Supply [Commission] has opined that the proposed remediation plan is inadequate.

Applicable Comment:

Bates # RWML0000010 (Sullivan)

Response:

The commenter did not cite the sources for this opinion. EPA is aware of two reports prepared for the North Jersey District Water Supply Commission regarding the groundwater remediation at the Site. Gowers Decl., Ex. 3 ¶ 35.⁴ The two reports are Final Report of Potential Fate and Transport of Benzene, 1,4-Dioxane, Lead and Arsenic at the Ringwood Mines Superfund Site Relative to the Wanaque Reservoir, dated May 2017, *available at* <https://semspub.epa.gov/work/02/473337.pdf> and Review of the OU3 Site Related Groundwater Focused Feasibility Study, Ringwood Mines/Landfill Superfund Site, dated March 2019, *available at* <https://semspub.epa.gov/work/02/563531.pdf>. Gowers Decl., Ex. 3 ¶ 35. These reports provide recommendations concerning potential remedies for contaminated groundwater at the Site. *Id.* EPA has and will continue to take these recommendations into consideration during the remedy selection process for Operable Unit 3. *Id.* Neither of these reports evaluate the protectiveness of the selected remedy for OU2 of the Site and are therefore beyond the scope of the OU2 cleanup. *See id.*

Groundwater contamination at the Site represents a permanent deprivation of the fundamental right to own land without due process of law, as well as a denial of adequate representation in the decision-making process.

Applicable Comment:

Bates # RWML0000010 (Sullivan)

Response:

The selection process for the groundwater remedy is ongoing, and EPA will solicit public comments for that process at the appropriate time. The work to be performed under this proposed Decree and as described in the OU2 ROD and Explanation of Significant Differences focuses on soil remediation in the Peters Mine Pit, Cannon Mine Pit, and O'Connor Disposal Area. As explained further below in Section II, there is no general right of the public to participate in CERCLA settlement negotiations. *E.g., United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 93 (1st Cir. 1990). And as explained above, Section 113(h) bars challenges to a selected remedy (here, the soil remediation) until after completion of that remedy. *See, e.g., Jach v. Am. Univ.*, 245 F. Supp. 2d 110, 114–16 (D.D.C. 2003) (rejecting the takings claim of private plaintiffs).

c. Other Comments Concerning Site Remedies

The Government has failed to provide a point person to explain to community members how the remedy will impact the community in terms of increased traffic, trucks, and other disturbances.

Applicable Comment:

Bates # RWML0000010 (Sullivan)

⁴ The United States did not receive a specific comment on this proposed Consent Decree by the North Jersey District Water Supply Commission. Moss Decl., Ex. 5 ¶ 11.

Response:

EPA discussed the impact to the community from the trucks, waste, traffic, construction, and general disturbances during the OU2 remedy selection process. Gowers Decl., Ex. 3 ¶ 30. EPA has assisted with the establishment of a Community Advisory Group that aids in the dissemination of information concerning cleanup activities at the Site and seeks community input on these activities. Gowers Decl., Ex. 3 ¶¶ 37, 42; Declaration of Patricia Seppi at ¶¶ 5–7, 11, attached as Exhibit 4. The EPA Remedial Project Manager and Community Involvement Coordinator for the Site have attended many Community Advisory Group meetings to explain these impacts and address community concerns. Gowers Decl., Ex. 3 at ¶¶ 6, 30, 42; Seppi Decl., Ex. 4 at ¶¶ 2, 7, 12, 15. EPA has also provided the Community Advisory Group access to a contractor through its Technical Assistance Services for Communities program to provide the community with a summary and independent review of Site documents, including documents discussing the impacts from trucks, waste, traffic, construction and general disturbances of the selected remedy. Seppi Decl., Ex. 4 ¶ 11. EPA also provided the Community Advisory Group a neutral facilitator who oversees the Group's meetings, provides an agenda, and informs Group members and other individuals of pending meetings. *Id.* at ¶ 14. Moreover, the details to accommodate increased trucks, traffic, waste, construction and general disturbances during the implementation of the OU2 selected remedy will be included in the Remedial Action Work Plan. Gowers Decl., Ex. 3 ¶ 30. The Remedial Project Manager and Community Involvement Coordinator will continue to serve as points-of-contact for the community during development of the Remedial Action Work Plan and implementation of the remedy. *See id.* at ¶ 42; Seppi Decl., Ex. 4 ¶ 15.

New Jersey has the authority to order a full cleanup under the New Jersey Spill Act. Previous DEP Commissioners have called for a full cleanup.

Applicable Comments:

Bates # RWML0000008 (Sierra Club); RWML0001403 (Kortjohn); RWML0001405 (Andreano); RWML0001408 (Feil); RWML0001412 (Fuhr); RWML0001413 (Arkema); RWML0001417 (Belluardo); RWML0001418 (McCloskey); RWML0001419 (Naprstek); RWML0001422 (Miller); RWML1424000 (Heavner); RWML0001425 (Miller); RWML0001427 (Fisher); RWML0001428 (Yavorksy); RWML0001429 (Rossin)

Response:

The selected remedy for OU2 is protective of human health and the environment and meets the requirements of CERCLA Section 121, 42 U.S.C. § 9621. Gowers Decl., Ex. 3 at ¶¶ 27–28; *see also* ROD at 5, ECF PageID 86; Explanation of Significant Differences, at 4, PageID 189. Although the New Jersey Spill Act does permit New Jersey to select remedies for sites subject to the Spill Act, this provision does not apply to sites where, as here, EPA serves as the lead agency under its authority under CERCLA. Instead, under CERCLA, EPA retains the express and exclusive authority to select a remedy after consulting with affected states. 42 U.S.C. § 9604(c)(2), (4); *see also N.J. Dep't of Env'tl. Prot. v. Gloucester Env'tl. Mgmt. Servs., Inc.*, Civ.

Nos. 84-0152 (JBS), 92-3860 (JBS), 2005 WL 1129763, at *13 (D.N.J. May 11, 2005) (explaining that CERCLA reserves an advisory role for the state where the site is located) (citing 42 U.S.C. § 9604(c)(4); 40 C.F.R. §§ 300.430(f)(5), 300.515(e)(2)(I)). In this case, NJDEP officially concurred with both the originally selected remedy and contingency remedy as set forth in the OU2 ROD and Explanation of Significant Differences. Gowers Decl., Ex. 3 ¶¶ 23, 27; Declaration of Kenneth Petrone at ¶¶ 7, 9, attached as Exhibit 6.

The selected remedy is insufficient because EPA ignored concerns and recommendations issued by the National Remedy Review Board.

Applicable Comment:

Bates # RWML0001313 (Conway)

Response:

EPA's National Remedy Review Board is a peer review group of EPA managers and technical and policy experts who review proposed Superfund cleanup decisions that meet cost-based criteria to make sure the cleanups are consistent with CERCLA, the National Contingency Plan, and EPA guidance.⁵ In a September 2013 memorandum, the National Remedy Review Board provided advisory recommendations to EPA concerning the proposed remedy for OU2, and EPA subsequently responded to those recommendations. Gowers Decl., Ex. 3 ¶ 17. EPA noted that many of the National Remedy Review Board's recommendations were incorporated into the documents that support the OU2 selected remedy. *Id.* For example, the National Remedy Review Board's recommendation #2 asks that EPA's approach to assessing and addressing site risk be explained in the Site decisional documents. *Id.* The OU2 ROD was subsequently prepared with a robust discussion of how potential risk was calculated for OU2. *Id.* In addition, the National Remedy Review Board recommended that decisional documents explain how paint sludge and drums would be addressed by the remedial alternatives if encountered during implementation of the selected remedy. *Id.* The OU2 ROD clearly discusses this scenario. *Id.*

Additionally, as noted above, CERCLA Section 113(h) expressly bars challenges to the selected remedy until the completion of the remedial action. 42 U.S.C. § 9613(h)(4). Therefore, comments criticizing the selected remedy are beyond the scope of this proposed Decree.

Significant health risks, death, and sickness have been reported, but have not been investigated.

Applicable Comments:

U.S. large postcards; U.S. small postcards; U.S. form comments; N.J. postcards; Bates # RWML0000010 (Sullivan); RWML0000281 (Salisbury); RWML0000283 (Lester); RWML0000351 (Bur); RWML0000363 (Snodgrass); RWML0000489 (Adams);

⁵ See generally Memorandum from Elliott P. Laws, Assistant Administrator, EPA, Formation of National Superfund Remedy Review Board, (Nov. 20, 1995), available at <https://semspub.epa.gov/work/HQ/176405.pdf>.

RWML0000499 (Shea); RWML0000538 (Outes); RWML0000576 (Fjord) RWML0000586 (Reik); RWML0000742 (Griffeth); RWML0000768 (Wei); RWML0000932 (Ashtyani); RWML0001026 (Orrison); RWML0001074 (Davis); RWML0001114 (Bush); RWML0001116 (Horowitz); RWML0001204 (Carpita); RWML0001206 (Carey); RWML0001310 (Tedesco); RWML0001332 (Milligan/Chiang); RWML0001349 (Siermarco); RWML0001375 (Riggiola)

Response:

Past health impacts at the Site have been evaluated by the United States Agency for Toxic Substances and Disease Registry (ATSDR) and the New Jersey Department of Health (NJDOH). In May 2006, ATSDR and NJDOH completed a public health assessment to determine whether past or current exposure to hazardous substances at the Site presented a public health hazard. Gowers Decl., Ex. 3 ¶ 36. This public health assessment concluded that the Site posed a public health hazard in the past and in 2006 based on health risks posed by exposure to lead and arsenic. *Id.* In December 2011, ATSDR and NJDOH completed two health consultations for the Site: one to evaluate lead exposure, and the other to evaluate cancer risks. *Id.* The lead exposure health consultation concluded that children's blood lead test results indicated that exposure to lead from paint sludge occurred in the past based on one documented case where exposure to paint sludge was considered the likely source of lead. However, blood lead data from children in the community, in general, did not indicate an on-going exposure to lead from residential soils. *Id.* The health consultation evaluating cancer risks posed by the Site concluded that overall cancer incidence, with the exception of lung cancer in men, was not elevated in the community living near the Site in the time period of 1979 through 2008 in comparison to cancer rates in New Jersey. *Id.*

Additionally, one commenter notes that the NJDOH performed another health consultation in 2015 at the request of a community member. (RWML0001349). That report concluded that lung cancer in men and cervical cancer among women were statistically significantly elevated for the Ramapough Lenape Nation Turtle Clan community of the Borough of Ringwood, compared to the Ramapough Lenape Nation Turtle Clan community of the Mahwah Township.⁶ Petrone Decl., Ex. 6 ¶ 11; *see also* 2015 NJDOH Health Report at 35, attached as Exhibit 23. It also found that overall mortality among men in the Ringwood Ramapough Lenape Nation Turtle Clan was statistically significantly elevated between 2004 and 2010. Petrone Decl., Ex. 6 at ¶ 11 (citing 2015 NJDOH Report at 35). However, the report specifically did not draw any conclusions related to environmental factors that may have caused these observations. *Id.* Instead, the report noted that tobacco smoking was "by far the biggest risk factor for lung cancer," but without data on the rates of tobacco usage among the studied

⁶ The 2015 health assessment performed by NJDOH noted that the low number of reported cases of cervical cancer resulted in some statistical unreliability. Petrone Decl., Ex. 6 at ¶ 11 n.1; 2015 NJDOH Report at 18. It also found higher incidents of low birth weight and premature births in the Ringwood Ramapough Lenape Nation Turtle Clan, but not statistically significantly higher. Petrone Decl., Ex. 6 at ¶ 11 n.1; 2015 NJDOH Report at 10–11.

populations, the report did not conclude whether tobacco use or other known risk factors⁷ were the likely cause for the observed increase in lung cancer. *Id.* (citing 2015 NJDOH Health Report at 36). Similarly, the report noted several known risk factors for cervical cancer,⁸ without concluding which of these factors or some other factor may have been the cause of the observed increase in cervical cancer incidents. *Id.* (citing 2015 NJDOH Health Report at 36). Additionally, this health consultation noted that it only focused on the residential location at the time that the adverse health incident was reported, and did not consider population mobility. *Id.* (citing 2015 NJDOH Health Report at 37).

Through the OU2 selected remedy, once implemented, and the future groundwater remedy, EPA and NJDEP will continue to address Site contamination that may present a risk to human health and the environment.

II. Comments Concerning the Turtle Clan of the Ramapough Lenape Tribe

The selected remedy failed to sufficiently address environmental justice concerns related to the Turtle Clan of the Ramapough Lenape Tribe.

Applicable Comments:

Form emails & postcards; RWML0000008 (Sierra Club); RWML0000010 (Sullivan); RWML0000111 (Sancic); RWML000163 (Berman); RWML0000281 (Salisbury); RWML0000311 (Tail); RWML0000351 (Bur); RWML0000363 (Snodgrass); RWML0000393 (Dominguez); RWML0000425 (Nason); RWML0000427 (Mekras); RWML0000489 (Adams); RWML0000499 (Shea); RWML0000525 (Stearns); RWML0000538 (Outes); RWML0000540 (Drechsler); RWML0000548 (Wagner); RWML0000566 (Canepa); RWML0000576 (Fjord); RWML0000586 (Reik); RWML0000582 (Goldhammer); RWML0000576 (Fjord); RWML0000592 (Dolsky); RWML0000600 (Gellert); RWML0000606 (Finneran); RWML0000612 (Fallert); RWML0000638 (Fraczek); RWML0000678 (Natalia D.); RWML0000716 (Weiman); RWML0000742 (Griffeth); RWML0000756 (Ufford-Chase); RWML0000766 (Moore); RWML0000768 (Wei); RWML0000784 (Janey); RWML0000813 (Fassett); RWML0000818 (July Sierra Club letter); RWML0000899 (Wearin); RWML0000920 (Rossiter); RWML0000922 (Grismer); RWML0000926 (Lioi); RWML0000932 (Ashtyani); RWML0000946 (Sundaram); RWML0000992 (Thombs); RWML0001024 (Dunlap); RWML0001313 (Conway); RWML0001026 (Orrison); RWML0001037 (Steele); RWML0001042 (Barker); RWML0001074 (Davis); RWML0001098 (Monette); RWML0001094 (Milanes); RWML0001098 (Monette); RWML0001110 (Buckland);

⁷ The report listed the following other known or suspected risks for lung cancer: secondhand smoke; high doses of ionizing radiation; residential radon exposure; and occupational exposure to asbestos, mustard gas, chloromethyl ethers, inorganic arsenic, hexavalent chromium, nickel, vinyl chloride, radon, or byproducts of fossil fuel combustion. Petrone Decl., Ex. 6 at ¶ 11 n.2; 2015 NJDOH Report at 36.

⁸ The report listed the following risk factors for cervical cancer: infection by the human papilloma virus (HPV); smoking; immunosuppression due to human immunodeficiency virus (HIV); being overweight; the use of certain contraceptives; and family history. Petrone Decl., Ex. 6 at ¶ 11 n.3; 2015 NJDOH Report at 36.

RWML0001114 (Bush); RWML0001116 (Horowitz); RWML0001138 (Lutz); RWML0001140 (Carmel); RWML0001160 (Wilder); RWML0001182 (Schwalb); RWML0001188 (Conroy); RWML0001204 (Carpita); RWML0001206 (Carey); RWML0001211 (Osterbrink); RWML0001219 (Waran); RWML0001253 (Mueller); RWML0001310 & 1460 (Tedesco); RWML0001332 (Milligan/Chiang); RWML0001333 & 1439 (CAG email); RWML0001349 (Seirmarco); RWML0001352 (Ohrvall); RWML0001362 (Chip G.); RWML0001367 (Starr); RWML0001375 (Riggiola); RWML0001403 (Kortjohn); RWML0001410 (Manno); RWML0001412 (Fuhr); RWML0001416 (Prince); RWML0001417 (Belluardo); RWML0001419 (Naprstek); RWML0001422 (Miller); RWML0001423 (Williamson); RWML0001425 (Miller); RWML0001427 (Fisher); RWML0001428 (Yavorksy); RWML0001429 (Rossin); RWML0001438 (Milligan)

Response:

EPA conducted an Environmental Justice (EJ) Assessment for the Site in 2006 that identified potential EJ concerns of the local community, which includes members of the Turtle Clan of the Ramapough Lenape Tribe who reside in the Upper Ringwood area, and recommended actions to address these concerns, which was released for public review in draft form. Gowers Decl., Ex. 3 ¶ 37. The recommendations included: restoration of the Site to the National Priorities List, establishment of a Community Advisory Group, facilitation of a Technical Assistance Grant, coordination with the NJDEP, collection of health data, and improved communication with Site stakeholders. *Id.* In July 2013, EPA finalized the EJ Assessment, which concluded that the Ringwood Mines community is an adversely impacted area. *Id.* However, given the current limits of localized health information about community residents, the area cannot be satisfactorily distinguished in order to perform a comparative assessment in determining whether a disproportionate impact (environmental injustice) had occurred or exists. *Id.*

This final EJ Assessment included an Addendum to the EJ Assessment that detailed how EPA addressed the recommendations in the 2006 draft EJ Assessment. *Id.* Consistent with those recommendations, EPA restored the Site to the National Priorities List in 2006; facilitated the formation of the Community Advisory Group for the Site; provided a Technical Assistance Grant to the Edison Wetlands Association for the benefit of the Community Advisory Group;⁹ and coordinates Site activities with NJDEP. *Id.* In addition, in 2006 and 2007, EPA encouraged the NJDOH and ATSDR to begin collection of health information with regard to potential

⁹ Currently, the Community Advisory Group no longer has access to a Technical Assistance Grant. Edison Wetlands Association received a Technical Assistance Grant for \$50,000 in 2009 and another \$50,000 in 2021. Seppi Decl., Ex. 4 ¶ 6. Because Edison Wetlands Association did not comply with the grant requirements, such as periodic reporting, EPA did not renew this Grant. Thus, this Grant ended in 2015. *Id.* at ¶ 8. In 2016, the Ramapough Conservancy, Inc. sent a letter of intent to apply for a Technical Assistance Grant, but an application for a Technical Assistance Grant has not been submitted to date by the Ramapough Conservancy, Inc. *Id.* at ¶ 9. However, EPA provides for technical support for the Community Advisory Group through the Technical Assistance Service for Communities program as noted below. *Id.* at ¶ 11.

contamination by lead, arsenic, and antimony. *Id.* In June 2011, the NJDOH and ATSDR returned to the Ringwood community and performed additional blood lead level testing in children. *Id.* at ¶ 36. Lastly, EPA has included and continues to include various stakeholders in the Site cleanup process via the Community Advisory Group and coordination with NJDEP. *Id.* at ¶ 37, 42.

The United States has an independent duty to ensure that the Turtle Clan of the Ramapough Lenape Tribe's interests in the Consent Decree are protected. The Turtle Clan has a direct interest in the Site because several members own property within the Site, and indirect interests through the Turtle Clan's historic use of the Site.

Applicable Comment:

Bates # RWML0000010 (Sullivan)

Response:

The Ramapough Lenape Tribe is recognized by the State of New Jersey, but not by the United States Bureau of Indian Affairs. Indian Entities Recognized by and Eligible to Receive Services from the U.S. Bureau of Indian Affairs, 84 Fed. Reg. 1,200, 1,203 (Feb. 1, 2019); Assembly Concurrent Resolution (Senate concurring) No. 3031, State of N.J., filed Jan. 8, 1980. The Tribe's recognition status limits the United States' duties toward the Tribe. The United States and New Jersey have considered and will consider the Tribe's interest in the Site, along with the other stakeholders at the Site, throughout any decision-making regarding the Site. Gowers Decl., Ex. 3 ¶ 43. As discussed above, the United States and New Jersey considered the potential environmental justice impacts on the Tribe's community as part of their decision making regarding the Site.

The Turtle Clan of the Ramapough Lenape Tribe is the only Native American tribe to reside on a Superfund Site, but no efforts have been made to relocate them.

Applicable Comment:

Bates # RWML0000010 (Sullivan)

Response:

EPA has a longstanding policy to address risks posed by contamination by using cleanup methods that allow people to safely remain in their homes. U.S. Environmental Protection Agency, Interim Policy of the Use of Permanent Relocations as Part of a Superfund Remedial Actions, OSWER Directive 9355.0-71P, dated June 30, 1999, *available at* <http://semspub.epa.gov/src/document/11/174832>. This policy is used to assess relocation in all instances, regardless of whether an impacted community is a Native American tribe.¹⁰ A

¹⁰ Permanent relocation under CERCLA should be implemented in accordance with the Uniform Relocation and Real Property Acquisition Policies Act (URA), 42 U.S.C. §§ 4600–4655, and

permanent relocation is primarily considered when an engineering solution is not readily available to address an immediate risk to human health or where the structure itself is an impediment to a cleanup.¹¹ *See id.* at 6.

However, at the Site, cleanup solutions are available to address contamination, and structures at the Site do not block cleanup. Thus far, lead-contaminated soil has been removed from the Site at various locations either by EPA or Ford without requiring permanent relocation of any residents. Gowers Decl., Ex. 3 ¶ 39. Exposure to certain contamination at the Site has been limited through fencing and access restrictions, and the selected remedy for OU2 will address contamination from the Cannon Mine Pit, Peters Mine Pit, and O'Connor Disposal Area. *Id.* Furthermore, residents at the Site receive drinking water from the municipal water supply, which has not been impacted by Site contamination. *Id.* Thus, permanent relocation at the Site is not triggered under these circumstances.

The Community Advisory Group no longer includes members of the Turtle Clan of the Ramapough Lenape Tribe and no longer functions as it was designed due to internal politics. The Chief of the Turtle Clan was physically intimidated at Community Advisory Group meetings. EPA should reestablish the Community Advisory Group, or alternatively, EPA should establish a separate Community Advisory Group.

Applicable Comment:

Bates # RWML0000010 (Sullivan); RWML0001313 (Conway)

Response:

EPA does not directly establish or control Community Advisory Groups. U.S. Environmental Protection Agency, Guidance for Community Advisory Groups at Superfund Sites at 2, OSWER Directive 9230.0-28, dated Dec. 1995, *available at* <https://semspub.epa.gov/work/HQ/174152.pdf>; *see also* 40 C.F.R. §§ 300.430(c) (requiring the input from a community on how and when it would like to be involved in the Superfund process). A Community Advisory Group can be formed at any time. EPA assists with the formation of a Community Advisory Group and provides feedback on its membership, but EPA does not choose the members of a Community Advisory Group. Community Advisory Group membership can naturally change as the need for it changes or based on individual preference to remain a part of the group. However, EPA always seeks to ensure that the Community Advisory

applicable regulations, 49 C.F.R. § 24, *et seq.*, which ensure that relocated individuals are treated fairly, consistently, and equitably. EPA Interim Policy on the Use of Permanent Relocations at 7.

¹¹ Some examples warranting permanent relocation include: structures that block or interfere with a cleanup and moving the structure or performing a cleanup around the structure is not technically feasible; structures cannot be decontaminated to a safe level for their intended use; cleanup methods that pose unreasonable use restrictions to maintain protectiveness (such as children not being allowed to play in a yard); or a temporary relocation is expected to last beyond a year. EPA Interim Policy on the Use of Permanent Relocations at 6.

Group process and meetings are conducted in a civil, inclusive, and welcoming manner to the best of its efforts.

At the Site, EPA has encouraged stakeholders, including Chief Mann, to work with the existing Community Advisory Group as these groups work best when they represent a diversity of opinions. *See generally* Seppi Decl., Ex. 4. Similarly, EPA will continue to encourage the participation of Upper Ringwood residents, including members of the Ramapough Lenape Tribe, and other stakeholders in any future Community Advisory Group meetings. EPA has also provided for a neutral facilitator to assist the Community Advisory Group with meeting preparation and facilitation during meetings. *Id.* at ¶¶ 7, 14. This neutral facilitator has worked with the Community Advisory Group to establish by-laws and operating procedures that encourage full participation in the group.

Members of the Ramapough Lenape Tribe were excluded from the consent decree negotiations. The Consent Decree contains no recitation of any compromise, accord, change, or amendment in favor of the Turtle Clan of the Ramapough Lenape Tribe.

Applicable Comment:

Bates # RWML0000010 (Sullivan)

Response:

The Turtle Clan of the Ramapough Lenape Tribe is not a party to the proposed Decree and therefore did not participate in the settlement negotiations. Further, neither CERCLA nor any other law requires the United States or New Jersey to hold a public settlement conference or otherwise include non-parties to discuss its settlement strategies, or otherwise negotiate environmental consent decrees with the public. As the First Circuit has held:

In the CERCLA context, the government is under no obligation to telegraph its settlement offers, divulge its negotiating strategy in advance, or surrender the normal prerogatives of strategic flexibility which any negotiator cherishes.... So long as it operates in good faith, the EPA is at liberty to negotiate and settle with whomever it chooses.

Cannons Eng'g Corp., 899 F.2d at 93; *see also United States v. Cornell-Dubilier Electronics, Inc.*, Civ. Act. No. 12-5407 (JLL), 2014 WL 4978635, at *5 (D.N.J. Oct. 3, 2014) (rejecting criticism of a consent decree that did not include all PRPs by noting that there is no right to participate in settlement negotiations with EPA) (citing *Cannons Eng'g Corp.*, 899 F.2d at 84). Consistent with these case holdings, EPA policy generally requires that the details of settlement offers, counteroffers, and other settlement dynamics be maintained as confidential to the fullest extent of the law and must not be disclosed to outside parties.¹²

¹² *See generally* Memorandum from Granta Y. Nakayama, Assistant Administrator for Enforcement and Compliance Assurance, EPA, Restrictions on Communicating with Outside Parties Regarding Enforcement Actions (Mar. 8, 2006), *available at*

The New Jersey Historic Preservation Office has failed to engage the Turtle Clan in an archaeological study of the area.

Applicable Comment:

Bates # RWML0000010 (Sullivan)

Response:

The commenter is correct that the New Jersey Historic Preservation Office has not directly engaged the Turtle Clan of the Ramapough Lenape Tribe regarding an archaeological study of the area. However, in March 2017, EPA completed a Phase IA Background Assessment and Archeological Review for the areas of the Site that would be impacted by the OU2 selected remedy. Gowers Decl., Ex. 3 ¶ 38. This involved the review of files from the New Jersey Historic Preservation Office, the New Jersey State Museums, and the New York State Historic Preservation Office. *Id.* This review found no inventoried historic resources in the immediate vicinity of OU2 areas of concern. *Id.* A field inspection in 2017 conducted by an archeologist found no features or properties warranting a cultural resources inventory with the OU2 areas of concerns. *Id.* Furthermore, the archeologist determined that the likelihood of finding intact significant archeological features was quite low due to the repeated alterations of the mines while they were active, during post-abandonment demolition, filling, and from previous cleanup activities in the mine areas. *Id.* Therefore, the archeological review concluded that implementation of the OU2 selected remedy will not affect historic resources. *Id.* In addition to participating in and reviewing all of the documents of the archaeological review, the New Jersey Historic Preservation Office was satisfied with the review's conclusions. *Id.*

Although the Ramapough have worked and lived in the Superfund Site and environs, no effort has been made to preserve the culture or history of the Turtle Clan of the Ramapough Lenape Tribe, including recovery of the remains of a boy who, according to community reports, fell into the Cannon Mine and perished.

Applicable Comment:

Bates # RWML0000010 (Sullivan)

Response:

The Plaintiffs refer generally to the response to the comment about the New Jersey Historic Preservation Office above, describing the archaeological review that was completed in 2017. Regarding reports of a tragic incident that EPA understands would have occurred in the early 1960s, the Plaintiffs are unable to provide any further response nor are Plaintiffs in possession of any additional information.

https://www.epa.gov/sites/production/files/documents/commrestrictions-nakayamamemo030806_0.pdf.

III. Comments Concerning Public Notice and Participation

The public comment period should be extended 60 days, for a total of 120 days. Not all members of the local community have access to electronic media and rely on paper copies of documents to be individually mailed to them. Important stakeholders, such as members of the Turtle Clan of the Ramapough Lenape Tribe, local residents, members of the North Jersey District Water Supply Commission, members of local environmental non-governmental organizations, and local educational institutions, should be given a meaningful opportunity to be notified and participate in the decision-making process for the Site.

Applicable Comments:

U.S. form comments; Bates #s RWML0000008 (Sierra Club); RWML0000279 (Hodgson); RWML0000281 (Salisbury); RWML0000283 (Lester); RWML0000351 (Bur); RWML0000363 (Snodgrass); RWML0000427 (Mekras); RWML0000489 (Adams); RWML0000499 (Shea); RWML0000525 (Stearns); RWML0000538 (Outes); RWML0000540 (Dreschler); RWML0000548 (Wagner); RWML0000566 (Canepa); RWML0000576 (Fjord); RWML0000582 (Goldhammer); RWML0000586 (Reik); RWML0000592 (Dolsky); RWML0000600 (Gellert); RWML0000606 (Finneran); RWML0000638 (Fraczek); RWML0000716 (Weiman); RWML0000742 (Griffeth); RWML0000756 (Ufford-Chase); RWML0000766 (Moore); RWML0000768 (Wei); RWML0000784 (Janey); RWML0000813 (Fassett); RWML0000818 (July Sierra Club); RWML0000899 (Wearin); RWML0000920 (Rossiter); RWML0000922 (Grismer); RWML0000926 (Lioi); RWML0000946 (Sundaram); RWML0000992 (Thombs); RWML0001042 (Barker); RWML0001074 (Davis); RWML0001094 (Milanes); RWML0001098 (Monette); RWML0001110 (Buckland); RWML0001114 (Bush); RWML0001116 (Horowitz); RWML0001138 (Lutz); RWML0001160 (Wilder); 1182 (Schwalb); RWML0001188 (Conroy); RWML0001204 (Carpita); RWML0001206 (Carey); RWML0001211 (Osterbrink); RWML0001219 (Waran); RWML0001367 (Starr)

Response:

As explained above, federal regulations require that the United States issue a notice of lodging of a proposed consent decree in the Federal Register and accept public comments for a period of at least 30 days. 28 C.F.R. § 50.7. Similarly, New Jersey must issue a notice of lodging of a proposed consent decree in the New Jersey Register and accept public comments for a period of at least 60 days. N.J.S.A. § 58:10-23.11e2.

Those requirements were satisfied here. On May 9, the United States issued notice of the proposed Consent Decree in the Federal Register, indicating that the public comment period would run for 60 days, which exceeds federal requirements. On May 6, New Jersey issued notice of the proposed Consent Decree in the New Jersey Register, indicating that the public comment would run for 60 days as well. After receipt of comments requesting an extension, both the United States and New Jersey agreed to accept public comments through July 29, 2019, a period of 81 days for the United States' comment period and 84 days for New Jersey's public comment period. In that time, the plaintiffs received approximately 1,284 timely comments, excluding the

533 quarantined email comments received by NJDEP. Moss Decl., Ex. 5 ¶ 11; Kratina Decl., Ex. 7 ¶¶ 4, 7.

The Community Advisory Group for the Site was excluded from the consent decree negotiation. A conflict of interest exists by only allowing the potentially responsible parties to participate in negotiations.

Applicable Comments:

Bates # RWML0001333 & 1439 (CAG Emails)

Response:

As noted above, there is no general right to participate in settlement negotiations, even by a Community Advisory Group. *E.g.*, *Cannons Eng'g Corp.*, 899 F.2d at 83; *cf. United States v. Town of Moreau*, 979 F. Supp. 129, 135-36 (N.D.N.Y. 1997) (“[I]t is doubtful that a public settlement conference would ever permit the type of give and take that would lead to an agreed resolution of the dispute.”). CERCLA’s goal is to ensure effective and efficient remediation of contaminated Sites, to be funded by those parties who are potentially responsible for the contamination. *E.g.*, *United States v. Witco Corp.*, 865 F. Supp. 245, 247 (E.D. Pa. 1994). Therefore, by its terms, CERCLA focuses on the enforcement authorities and the potentially responsible parties. Public participation is appropriate upon issuance of the notice of the lodged proposed consent decree, the comment period, and this responsiveness summary. In this case, the United States and New Jersey followed those procedures.

Significant materials produced by technical advisors hired for the Community Advisory Group have not been catalogued in a central repository or added to the official administrative record for the Site.

Applicable Comment:

Bates # RWML0000818 (July Sierra Club letter)

Response:

It is unclear what materials the commenter is referring to in this comment. To the extent that materials were provided to EPA as part of the public comment process for the selection of the OU2 remedy, the comments and EPA’s responses to those comments are memorialized in the responsiveness summary of the OU2 ROD and, as such, are a part of the administrative record for the Site. 40 C.F.R. § 300.815(b). Generally, any information that EPA considers during the remedy selection and overall Site decision-making process is a part of the administrative record. *Id.* at § 300.810(a). Moreover, all of the documents related to a site, including and beyond the administrative record, are part of the overall site file and maintained in accordance with the Federal Records Act, 44 U.S.C. § 3101 *et seq.*, as amended. EPA is aware of the current contents of the Site file and submissions from the public regarding the Site to date. Gowers Decl., Ex. 3 ¶ 40. The administrative record and public documents within the Site file are available for review

by the public at the Ringwood Library at 30 Cannici Drive in Ringwood and at EPA's Superfund File Room at 290 Broadway, New York, NY. *Id.*

A public hearing should be granted on the proposed consent decree.

Applicable Comments:

Bates # RWML0000008 (Sierra Club); RWML0000255 (Sanchez); RWML0000427 (Mekras)

Response:

Neither CERCLA nor the Spill Act require the respective agencies to conduct a hearing prior to lodging or seeking entry of a proposed consent decree. *See United States v. Charles George Trucking, Inc.*, 34 F.3d 1081, 1085 (1st Cir. 1994) ("Requiring hearings to review the reasonableness of CERCLA consent decrees as a matter of course would frustrate the statutory objective of expeditious settlement.") (citation omitted). Thus, courts routinely enter a consent decree without conducting a hearing. *E.g.*, *Cornell-Dubilier*, 2014 WL 4978635, at *1 (citations omitted). As discussed above, the United States and New Jersey issued notices of the proposed consent decree consistent with federal and state law and held public comment periods that exceeded federal and state requirements. The decision to hold a hearing on the pending motion to enter the Decree is ultimately the Court's. *E.g.*, *In re Tutu Wells CERCLA Litigation*, 326 F.3d 201, 209 (3d Cir. 2003). Nonetheless, the Plaintiffs' position is that a hearing is unnecessary, and this Court may approve the Motion to Enter after a review of the pertinent case law and the explanations contained in this and the accompanying documents.

EPA denied requests from Ringwood community members for a Technical Assistance Grant, Technical Assistance Service for Communities, and Community Advisory Group Grant.

Applicable Comments:

U.S. large postcards, U.S. small postcards, U.S. form comments; Bates # RWML0000489 (Adams); RWML0000499 (Shea); RWML0000538 (Dreschler); RWML0000548 (Wagner); RWML0000566 (Canepa); RWML0000576 (Fjord); RWML0000582 (Goldhammer); RWML0000592 (Dolsky); RWML0000600 (Gellert); RWML0000606 (Finneran); RWML0000638 (Fraczek); RWML0000678 (Natalia D.); RWML0000716 (Weiman); RWML0000742 (Griffeth); RWML0000766 (Moore); RWML0000784 (Janey); RWML0000813 (Fassett); RWML0000899 (Wearin); RWML0000920 (Rossiter); RWML0000922 (Grismer); RWML0000926 (Lioi); RWML0000932 (Ashtyani); RWML0000946 (Sundaram); RWML0000992 (Thombs); RWML0001042 (Barker); RWML0001094 (Milanes); RWML00001098 (Monette); RWML0001114 (Bush); RWML0001138 (Lutz); RWML00001140 (Carmel); RWML00001182 (Schwalb); RWML00001188 (Conroy); RWML0001204 (Carpita); RWML0001211 (Osterbrink); RWML0001219 (Waran); RWML0001310 (Tedesco); RWML0001352 (Ohrvall); RWML0001375 (Riggiola)

Response:

The Ringwood community, primarily through the Community Advisory Group, has received technical support services through EPA's Technical Assistance Service for Communities program and a Technical Assistance Grant. As noted above, in 2009, the Edison Wetlands Association received a Technical Assistance Grant for \$100,000 for the benefit of the Community Advisory Group. Seppi Decl., Ex. 4 ¶ 6. This Grant provided technical assistance to the Community Advisory Group for three years. *Id.* Through it, the Edison Wetlands Association retained a technical advisor to assist the Community Advisory Group in reviewing technical documents related to the Site cleanup. *Id.* However, in 2015, EPA declined to renew this Grant because the Edison Wetlands Association had not complied with certain requirements, which included providing periodic reports under the Grant. *Id.* at ¶ 8. The Ramapough Conservancy, Inc. sought a grant to complete a Technical Assistance Grant application, but EPA denied that request because that is an inappropriate use of a Technical Assistance Grant. *Id.* at ¶ 9. The Ramapough Conservancy, Inc. has not submitted a Technical Assistance Grant application to EPA to date. *Id.* From 2016 to present, Skeo Solutions, as part of the Technical Assistance Service for Communities program, has provided technical assistance to the Community Advisory Group by presenting technical information to the Group and assisting with providing comments on certain technical documents shared by EPA. *Id.* at ¶ 11. Thus, the Ringwood community has received the benefit of EPA's Technical Assistance Grant and Technical Assistance Service for Communities programs. EPA does not offer Community Advisory Group Grants as suggested by the comments.

IV. Comments Regarding Complaint and Consent Decree

The United States must explain the "threatened release" discussed at Paragraph 30 of the complaint.

Applicable Comment:

Bates # RWML0001313 (Conway)

Response:

CERCLA Section 101(22) defines a release as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)" 42 U.S.C. § 9601(22). The National Contingency Plan further defines a release to include the threat of release. 40 C.F.R. § 300.5. A release or threatened release of hazardous substances, pollutants, or contaminants at the Site primarily stems from the alleged disposal of waste material from Ford's plant in Mahwah, New Jersey. Such waste included plant trash, paint sludge, drummed waste, and other non-liquid plant waste, which was disposed of at Cannon Mine Pit, Peters Mine Pit and O'Connor Disposal Area of the Site. ROD at 1–2, PageID 82–83. Paint sludge and other drummed industrial wastes are the primary sources of contamination at the Site, and these sources of contamination resulted in the release or threat of release of elevated levels of lead,

polychlorinated biphenyl compounds, and arsenic which are all hazardous substances. *Id.* at 7, PageID 88.

The State of New Jersey should be a Potentially Responsible Party (PRP) for the Peters Mine Pit and therefore liable to perform under the Consent Decree and contribute costs.

Applicable Comments:

Bates # RWML0000035 (Guinan); RWML0001313 (Conway)

Response:

EPA has broad discretion in structuring CERCLA settlements. *United States v. Davis*, 261 F.3d 1, 23 (1st Cir. 2001). Specifically, “the government’s decisions on whether and with whom to settle are not subject to judicial review.” *United States v. Atlas Minerals & Chems. Co.*, 851 F. Supp. 639, 653 (E.D. Pa. 1994) (citing 42 U.S.C. § 9622(a)). In this case, EPA issued notices of potential liability to Ford and the Borough in 1983 and 1990, respectively. Gowers Decl., Ex. 3 ¶¶ 11, 13. Historically, EPA has directed Ford and the Borough to participate and cooperate in cleaning up the Site with approval by New Jersey. Consent Decree § I, ¶¶ F–N, PageID 18–19. Consistent with CERCLA Section 121(f)(1)(F), 42 U.S.C. § 9621(f)(1)(F), the United States notified New Jersey of these negotiations and invited the State to participate in 2015. *Id.* ¶ C, PageID 18. The proposed Consent Decree was the product of an arm’s-length negotiations between the United States, New Jersey, Ford, and the Borough. The Consent Decree provides that Ford and the Borough (the two PRPs to the Decree) will fund and perform all the remedial work under the OU2 ROD and the Explanation of Significant Differences.

The United States should be a PRP because a defense contractor operated at the Site during World War II and because it has failed to protect human health and the environment.

Applicable Comments:

Bates # RWML0000035 (Guinan); RWML0001313 (Conway)

Response:

As stated above, this settlement resulted from the arm’s-length negotiations of parties with opposing interests. The PRP parties to the Consent Decree have agreed to perform the work of the OU2 ROD and Explanation of Significant Differences. In response to the argument that the United States is liable by virtue of its previous clean-up activities at the Site, courts have routinely rejected such arguments. *E.g.*, *United States v. Sensient Colors, Inc.*, Civ. No. 07-1275 (JHR), 2009 WL 394317, at *1, *8 (D.N.J. Feb. 13, 2009) (citations omitted); *In re Paoli R.R. Yard PCB Litig.*, 790 F. Supp. 94, 97 (E.D. Pa. 1992), *aff’d*, 980 F.2d 724 (3d Cir. 1992) (table).

The Borough of Ringwood is not a proper PRP for the Peters Mine Pit and should not be liable under the Decree.

Applicable Comment:

Bates # RWML0000035 (Guinan)

Response:

Although the commenter is correct that the Borough does not own the Peters Mine Pit, the Borough is a PRP for the Site by virtue of currently owning the O'Connor Disposal Area and historically operating a municipal landfill at the Site. CERCLA imposes joint and several liability on all PRPs; apportioning liability is only appropriate where "there is a reasonable basis for determining the contribution of each cause to a single harm." *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 614 (2009) (citation omitted). It is the burden of the PRPs to prove that this reasonable basis exists, and this inquiry is "intensely factual." *Id.*; *ITT Corp. v. Borgwarner Inc.*, No. 1:05-CV-674, 2009 WL 2356263, at *4 (W.D. Mich. July 29, 2009) (citing *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 269 (3d Cir. 1992)). Here, the parties conducted an arm's-length negotiation and resolved this matter without litigating this issue.

The United States improperly relied upon guidance documents when determining that the Borough was subject to CERCLA liability for the Site.

Applicable Comment:

Bates # RWML0000818 (Sierra Club)

Response:

The commenter refers specifically to a November 3, 2016 letter from EPA sent to counsel for the Borough, which is attached as Exhibit 8, and a Memorandum issued by the Associate Attorney General titled Limiting the Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases dated January 25, 2018, *available at* <https://www.justice.gov/file/1028756/download> (January 2018 Memorandum). The January 2018 Memorandum states, "[g]uidance documents cannot create binding requirements that do not already exist by statute or regulation."

The November 2016 Letter responded to a request from the Borough seeking an exemption from liability under Section 101(20)(D) of CERCLA, 42 U.S.C. § 9601(20)(D). That section states:

The term "owner or operator" does not include a unit of State or local government which acquired ownership or control through seizure or otherwise in connection with law enforcement activity, or through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively,

as any nongovernmental entity, including liability under Section 9607 of this title.¹³

Although the November 2016 letter generally referenced a 1995 memorandum from EPA in footnote 2, it also made clear that the United States believes that the second sentence of Section 101(20)(D) of the federal statute governs the Borough's liability. Therefore, the United States' decision to pursue the Borough as a PRP under this Decree does not conflict with the January 2018 Memorandum.

The commenter also raises more general concerns about the use of guidance documents in enforcing this Decree. Guidance is not law, and EPA guidance documents are not binding. Should the Court enter the proposed Decree, it will have the effect of law. That Decree, along with any applicable statutory and regulatory provisions, will govern any future enforcement matters.

The covenants in the Consent Decree are overbroad and violate CERCLA because they only address removal, instead of long-term remediation.

Applicable Comment:

Bates # RWML0000010 (Sullivan)

Response:

Under the terms of the Decree, the Plaintiffs, Ford, and the Borough have provided covenants to each other that are limited to the selected remedy for OU2 and the obligations under the Decree. Specifically, covenants between the United States and the Defendants are limited to the Work, Past Response Costs, and Future Response Costs as defined in the Consent Decree. *See* Consent Decree at ¶¶ 61, 65. The Work relates to implementation of the OU2 selected remedy and other obligations agreed upon in the Decree. Similarly, the covenants between the State of New Jersey and the Defendants are limited to NJDEP Past Cleanup and Removal Costs and NJDEP Future Cleanup and Removal Costs as defined in the Decree. Collectively, these covenants are granted based upon Defendants' compliance with, and limited to, the implementation of the selected remedy, payment of certain past costs, payment of certain future costs, and other obligations imposed in the Consent Decree. These covenants are of the form routinely granted between the Plaintiffs and Defendants of a CERCLA consent decree.

Implementation of the OU2 selected remedy is a step toward long-term remediation of the Site. Removal actions have occurred at the Site to complement long-term remediation. Gowers Decl. ¶ 39. However, the covenants in the Decree do not release Ford or the Borough from potential liability for any other cleanup activities that may be required at the Site. *See* Consent Decree at ¶ 62.

¹³ The cited text reflects amendments made on March 23, 2018, rather than the language cited in the November 2016 Letter. *See* Pub. L. No. 115-141, tit. VII, §§ 2–4, 5(a), 132 Stat. 348, 1052–54 (Mar. 23, 2018). These amendments do not affect the United States' view of the Borough's liability.

The Site is located in the New Jersey Highlands, an environmentally sensitive area. The Consent Decree relies on an unsupported Brownfields exception to the New Jersey Highlands Council.

Applicable Comments:

Bates # RWML0000010 (Sullivan); RWML0000008 (Sierra Club); RWML0000818 (Spiegel); RWML0001403 (Kortjohn); RWML0001405 (Andreano); RWML0001419 (Naprstek); RWML0001421 (Piatek); RWML0001422 (Miller); RWML0001423 (Williamson); RWML1424000 (Heavner); RWML0001425 (Miller); RWML0001428 (Yavorksy)

Response:

Ordinarily, sites located within the Highlands Preservation Area are subject to the Highlands Water Protection and Planning Act and its implementing regulations, the Highlands Water Protection and Planning Act Rules. N.J.S.A. § 13:20-1 *et. seq.*; N.J.A.C. § 7:38-1 *et. seq.* The Highlands Rules provide for an exemption from the requirements of the Highlands Act for the remediation of any contaminated site pursuant to N.J.S.A. § 58:10B-1 *et seq.*, which imposes a duty upon responsible persons to remediate contaminated sites. N.J.A.C. § 7:38-2.3(a)(15). Accordingly, NJDEP granted two exemptions related to the Site. On July 1, 2005, NJDEP granted an exemption to the Highlands Act requirements for all remedial activities ordered or directed in writing by EPA. Petrone Decl., Ex. 6 ¶ 10; *see also* July 1, 2005 Highlands Act Exemption Letter, attached as Exhibit 21. Accordingly, on June 1, 2015, NJDEP granted an exemption to the Highlands Act requirement to the Borough for the construction of a recycling center at the O'Connor Disposal Area consistent with the OU2 ROD and Explanation of Significant Differences. Petrone Decl., Ex. 6, ¶ 10; *see also* June 1, 2015 Highlands Act Exemption for Site, attached as Exhibit 22. Therefore, the Highlands Water Protection and Planning Act Rules provide for an exemption for remediation that applies to this Site.

The Consent Decree does not conform with Executive Order 23 of Governor Murphy

Applicable Comments:

Bates # RWML0000008 (Sierra Club); RWML0001402 (Andrade); RWML0001403 (Kortjohn); RWML0001405 (Andreano); RWML0001419 (Naprstek); RWML0001422 (Miller); RWML0001423 (Williamson); RWML1424000 (Heavner); RWML0001425 (Miller); RWML0001428 (Yavorksy); RWML0001429 (Rossin)

Response:

Governor Murphy of the State of New Jersey issued Executive Order 23 on April 20, 2018, which is attached as Exhibit 24. In recognition of the fact that low-income communities and communities of color are often disproportionately affected by environmental degradation, Executive Order 23 directed NJDEP to develop guidance for the Executive Branch of the State of New Jersey to consider environmental justice in implementing their statutory and regulatory responsibilities. Petrone Decl. at ¶ 12. That guidance has not yet been finalized. *Id.* Consistent with the pending draft guidance document, the local community was provided a timely and

meaningful opportunity to participate and provide its views for consideration by the decision makers on the proposed action. *Id.*

The proposed settlement is not acceptable, particularly to local residents.

Applicable Comment:

Bates # RWML0001426 (DeLuca)

Response:

Assuming that the commenter refers to the fact that local residents do not find the selected remedy acceptable, the OU2 ROD documented that the majority of public comments received for the OU2 ROD oppose any remedy that does not provide for the complete excavation and off-site disposal of fill material at the Site. Gowers Decl., Ex. 3 ¶ 18. The commenter provides no further details supporting the assertion that the settlement is unacceptable. Nevertheless, the settlement provides for the full implementation of the remedy selected in the OU2 ROD and Explanation of Significant Differences. The United States' position, as described herein, is that the remedy is protective of human health and the environment, and the remedy was selected in compliance with regulations governing the remedy selection outlined in the National Contingency Plan. *Id.* at ¶¶ 22, 27–28.

V. Other Comments

During a visit to the Site during a college class trip, two individuals had to be removed due to an exposure of methane gas on a street near Peters Mine Road.

Applicable Comment:

Bates # RWML0000010 (Sullivan)

Response:

This comment exceeds the scope of the Consent Decree because it fails to offer any basis that the Decree is not fair, reasonable, or consistent with CERCLA's goals. Neither the United States nor the State of New Jersey attended the visit referenced by the commenter. Therefore, the Plaintiffs lack sufficient information to respond further.

One of the Defendants was permitted to hire a leading public relations firm that engaged in a campaign of righteousness that stifled the Turtle Clan's objections to the proposed remediation plan.

Applicable Comment:

Bates # RWML0000010 (Sullivan)

Response:

The focus of the proposed Decree is the performance of the cleanup selected in the OU2 ROD and Explanation of Significant Differences in full compliance with the law and the

National Contingency Plan. This comment does not demonstrate that the Decree is potentially unfair, unreasonable, or inconsistent with CERCLA's goals.

EPA must conduct a complete investigation of the ownership of the O'Connor Disposal Area to determine who is entitled to determine its future use.

Applicable Comments:

Bates # RWML0001333 & 1439 (CAG email)

Response:

The Borough is the current owner of the O'Connor Disposal Area and can determine land use as a function of its municipal authority. Based on the Borough meeting certain conditions outlined in the OU2 ROD, EPA issued an Explanation of Significant Differences to select the contingency capping remedy for the O'Connor Disposal Area. Gowers Decl., Ex. 3 ¶ 27. Should the Borough transfer its portion of the property within the Site in the future, the Decree contains specific requirements governing such future transfers. Consent Decree, ¶¶ 19–20, PageID 30.

EPA has historically manipulated the local community with respect to this Site, including conducting off-the-record conversations with stakeholders to exclude and divide residents of Ringwood, as well as lying about the ultimate remedy.

Applicable Comment:

Bates # RWML0001313 (Conway)

Response:

EPA respectfully disagrees with the characterizations of its efforts at the Site. EPA has consistently involved the community, as and when appropriate, throughout the Site's history. This involvement has included, among other things, participation at Community Advisory Group meetings, provision of grant and contractor support for technical assistance to the Community Advisory Group, and formal public comment periods for the OU2 ROD and the Consent Decree as required by law. Gowers Decl., Ex. 3 ¶¶ 18, 37, 42; Seppi Decl., Ex. 4 ¶¶ 5–12, 14. EPA strives to keep the community informed and engaged in the decision-making for the Site where appropriate and will continue to do so during implementation of the OU2 selected remedy, enforcement of the Decree, and future cleanup efforts at the Site.

Commenters were informed that the New Jersey state government formally approved dumping related to the Site in the 1970s and requested any relevant permits or approvals.

Applicable Comments:

N.J. postcards (e.g., RWML0001398).

The Site file maintained by EPA contains a permit issued by NJDEP to the O'Connor Trucking and Haulage Corporation to dispose of solid waste at Lot Nos. 1, 3; 1, Block Nos. 600,

601 in the Borough, which is attached as Exhibit 18. Gowers Decl., Ex. 3 at ¶ 41. This permit was issued on July 28, 1970, and was set to expire on June 30, 1971. *Id.* The Site file contains no other similar permits. *Id.*